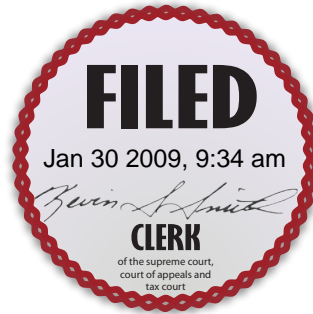


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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PAUL LOCKHART,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0805-CV-224
	)	
CORPORATE SERVICES, INC.,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT  
The Honorable Michael P. Scopelitis, Judge  
Cause No. 71D07-0310-PL-392

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**January 30, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Paul Lockhart appeals the trial court’s judgment in favor of Corporate Services, Inc. (“CSI”). Lockhart raises two issues, which we revise and restate as whether the trial court erred by concluding that CSI had demonstrated the elements of fraud. On cross-appeal, CSI raises one issue, which we restate as whether the trial court abused its discretion by denying CSI’s request for attorney fees.<sup>1</sup> We affirm in part and reverse in part.

The relevant facts follow. Lockhart was employed by CNA Unisource (“CNAU”) from 1997 through 2002. CNAU provided document scanning, storing, and retrieval services to clients, including Honeywell. Lockhart serviced the Honeywell account.

In May 2002, Lockhart created a business plan for CNAU. The business plan noted that another business would need a “minimum investment of \$700,000 to build the technology and recruit staff to support” the document services being offered by CNAU. Appellant’s Appendix at 129. Lockhart attached a “12 Month Projected Profit & Loss Statement” to the business plan. *Id.* at 135. The statement indicated total revenue for March 2002 of \$2,831.00 and total revenue for April 2002 of \$2,930.00. The March and April 2002 revenue numbers were “actual” revenue from the Honeywell account. Transcript at 501.

In July 2002, CNAU informed Lockhart that it would cease providing the document scanning, storing, and retrieval services at the end of 2002. Lockhart then

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<sup>1</sup> We remind CSI that Ind. Appellate Rule 46 provides that the statement of the case “shall briefly describe the nature of the case, the course of the proceedings relevant to the issues presented for review, and the disposition of these issues by the trial court or Administrative Agency.” We note that CSI’s statement of the case is inappropriately rife with argument. *See, e.g., Paramanandam v. Herrmann*, 827 N.E.2d 1173, 1174 n.1 (Ind. Ct. App. 2005).

acquired the rights from CNAU to service the Honeywell account through his own corporation, ScanStor, Inc. Lockhart approached CSI in November 2002, seeking a loan to purchase the equipment necessary to start his business. CSI rejected Lockhart's loan request but started negotiating with Lockhart to form a business relationship.

In December 2002, CSI's chief operating officer, Milind Agtey, created a "pro forma" based upon "information that Mr. Lockhart gave [him]." Plaintiff's Exhibit 1; Transcript at 112. The pro forma provided that Lockhart would be an independent contractor of CSI until March 1 and that he would be an employee of CSI after March 1. CSI would fund the initial investments of hardware and software necessary to start the business, which were estimated to be \$152,300, and would own "100% of the company." Id. When CSI's initial investment was repaid, Lockhart would receive a bonus of ten percent of the profits. CSI's ownership would continue for twenty-four months "after breakeven," and Lockhart could then purchase the company "valued at 1 times Gross Revenue or 15% of Gross Revenue over subsequent 5 years." Id. The pro forma projected revenue of approximately \$9,000.00 in January 2003 from Honeywell's business. Revenue for February 2003 was projected at approximately \$18,000.00 based upon Honeywell's business and the rest of CNAU's document scanning, storage, and retrieval business.

In January and February 2003, CSI's revenue from the Honeywell account was approximately \$4,000.00 per month. The revenue from the Honeywell account gradually increased and, at the time of the trial in late 2006, had increased to approximately

\$7,000.00 per month. The “cost of starting up the business to service the Honeywell contract” listed in the pro forma was “relatively accurate.” Transcript at 134.

Due to a dispute between Lockhart and CSI, Lockhart’s relationship with CSI ended in February 2003. CSI then filed a complaint against Lockhart for breach of contract, breach of fiduciary duty, fraud, and violation of trade secrets. Prior to the bench trial, CSI dismissed the fraud and trade secrets claims without prejudice. At the bench trial, CSI sought to reinstate the fraud claim over Lockhart’s objection, and the trial court allowed the fraud claim to be reinstated.

After the bench trial, the trial court entered judgment in favor of CSI. Specifically, the trial court found for CSI on the breach of contract and breach of fiduciary duty claims and awarded damages of \$11,726.35. On the fraud claim, the trial court found for CSI and awarded damages of \$60,000.00. The trial court denied CSI’s claim for punitive damages and CSI’s claim for attorney fees. The trial court also denied Lockhart’s counterclaims.

## I.

The first issue is whether the trial court erred by concluding that CSI had demonstrated the elements of fraud. Lockhart challenges only the award on the fraud claim. Lockhart does not challenge the trial court’s award on the breach of contract and breach of fiduciary duty claims, nor does he appeal the denial of his counterclaims.

The trial court here entered a general judgment without special findings and conclusions. “In the absence of special findings, we review a trial court decision as a general judgment and, without reweighing evidence or considering witness credibility,

affirm if sustainable upon any theory consistent with the evidence.” Baxendale v. Raich, 878 N.E.2d 1252, 1257 (Ind. 2008).

The elements of actual fraud are: (i) material misrepresentation of past or existing facts by the party to be charged (ii) which was false (iii) which was made with knowledge or reckless ignorance of the falseness (iv) was relied upon by the complaining party and (v) proximately caused the complaining party injury. Rice v. Strunk, 670 N.E.2d 1280, 1289 (Ind. 1996). Lockhart argues that the trial court erred in two respects. First, Lockhart argues that there was no misrepresentation of a past or existing fact because his statements to CSI were merely projections of future profits. Second, Lockhart argues that CSI did not have the right to rely upon the alleged misrepresentations.

We first address Lockhart’s argument that CSI failed to prove a misrepresentation of a past or existing fact. “Actual fraud may not be based on representations of future conduct, on broken promises, or on representations of existing intent that are not executed.” Wallem v. CLS Industries, Inc., 725 N.E.2d 880, 889 (Ind. Ct. App. 2000). “[M]ere statements of opinion as to future profits rather than past or existing facts . . . are not actionable.” Pugh’s IGA, Inc. v. Super Food Services, Inc., 531 N.E.2d 1194, 1198 (Ind. Ct. App. 1988), reh’g denied, trans. denied. Lockhart contends that the alleged misrepresentations were merely projections of future profits and opinions. CSI argues that Lockhart made three misrepresentations of past or existing facts: (1) the start up costs; (2) the number of customers of Lockhart’s business; and (3) the past and existing revenue from the Honeywell account.

As for the start up costs, Lockhart's May 2002 business plan noted that another business would need a "minimum investment of \$700,000 to build the technology and recruit staff to support" the document services being offered by CNAU. Appellant's Appendix at 129. Agtey's pro forma, which was based on information from Lockhart, estimated initial investments of hardware and software necessary to be \$152,300. Although CSI complains of the difference between the costs in the May 2002 business plan and the pro forma, the evidence demonstrated that the "cost of starting up the business to service the Honeywell contract" listed in the pro forma was "relatively accurate." Transcript at 134. CSI failed to demonstrate any misrepresentation as to the start up costs.

As for the number of customers Lockhart's business would bring to CSI, CSI contends that Lockhart represented he would bring Honeywell and CNAU as customers. According to CSI, CNAU did not materialize as a customer. The only evidence cited by CSI that Lockhart represented CNAU as a customer is an email in which Agtey asked Lockhart, "By the way what progress on the scanning project for Unisource?" Plaintiff's Exhibit 6. Additionally, Agtey testified that Lockhart represented that CSI would get other clients in February. Transcript at 193. The email and testimony fail to demonstrate that Lockhart represented CNAU as an existing client rather than a prospective client, and fraud cannot be based upon future projections.

Finally, as for the past or existing revenue from the Honeywell account, the evidence demonstrated that, in December 2002, Agtey created a "pro forma" based upon "information that Mr. Lockhart gave [him]." Plaintiff's Exhibit 1; Transcript at 112. CSI

projected revenue of approximately \$9,000.00 in January 2003 from Honeywell's business. However, in May 2002, Lockhart's business plan for CNAU noted that total revenue from the Honeywell account for March 2002 was \$2,831.00 and total revenue for April 2002 was \$2,930.00. In January and February 2003, CSI's actual revenue from the Honeywell account was approximately \$4,000.00 per month. The revenue from the Honeywell account gradually increased and, at the time of the trial in late 2006, had increased to approximately \$7,000.00 per month.

CSI argues that Lockhart managed the Honeywell account for CNAU, knew the actual revenue from the account, and misrepresented the actual revenue. We note that the fraud claim here was dismissed without prejudice and refiled on the day of trial. Over Lockhart's objection, the trial proceeded on the fraud claim as well as the other claims. The main focuses of the trial were CSI's claims of breach of contract and breach of fiduciary duty. The only evidence presented at the trial on this alleged misrepresentation was that Agtey created a "pro forma" in December 2002 based upon "information that Mr. Lockhart gave [him]." Plaintiff's Exhibit 1; Transcript at 112. CSI presented no specific evidence regarding the information Lockhart gave Agtey and presented no evidence that Lockhart gave Agtey information regarding Honeywell's past performance. Moreover, although CSI complains that the January 2003 revenue did not meet Lockhart's projections, the January 2003 revenue would have been a future projection, which cannot support a fraud claim. See, e.g., Gable v. Curtis, 673 N.E.2d 805, 811 (Ind. Ct. App. 1996) ("Projections regarding future expectations are not actionable as fraud

because they are mere statements of opinion rather than statements of past or existing facts.”).

Finally, we note that:

Whether a given representation is an expression of opinion or a statement of fact depends on the particular facts and circumstances of the case. The relation of the parties, the form and subject matter of the representation, and the opinionative quality of the representation are all relevant to the determination. In many cases, the question of whether the representation is actionable is subsumed by the question of the right of reliance and thereby becomes a matter for the jury. However, the authorities clearly allow the courts, when confronted with representations which are simply not the stuff that fraud is made of, to find as a matter of law either that the representations are not actionable or that the plaintiffs had no right to rely as a matter of law.

Plymale v. Upright, 419 N.E.2d 756, 763 (Ind. Ct. App. 1981). The evidence presented in this action is, quite simply, “not the stuff that fraud is made of.” Id. As a result, we conclude that the trial court erred by entering judgment for CSI on its fraud claim against Lockhart. See, e.g., id. at 767-768 (“We are of the opinion the plaintiffs failed to present substantial evidence to support either the element of material misrepresentation or the right of reliance.”). Because CSI failed to present evidence of an actionable misrepresentation, we need not consider whether CSI was entitled to rely upon the alleged misrepresentations. We reverse the trial court’s judgment for CSI on its fraud claim against Lockhart.

## II.

The cross-appeal issue is whether the trial court abused its discretion by denying CSI’s request for attorney fees. The party requesting assessment of attorney fees has the burden of proof at trial, and the losing party on the issue appeals a negative judgment.



Buschman v. ADS Corp., 782 N.E.2d 423, 431 (Ind. Ct. App. 2003). On appeal, we will not reverse a negative judgment unless it is contrary to law. Id. To determine whether the judgment is contrary to law, we will consider the evidence in the light most favorable to Lockhart together with all the reasonable inferences to be drawn therefrom. Id. We will reverse the judgment only if the evidence leads to but one conclusion and the trial court reached the opposite conclusion. Id.

Generally, litigants must pay their own attorney fees in the absence of a statute, stipulation, or agreement providing otherwise. Id. CSI makes no argument that it was entitled to attorney fees pursuant to a statute, agreement, or stipulation of any kind. CSI relies upon only two dissolution of marriage cases; however, attorney fees are allowed per statute in dissolution cases. See Ind. Code § 31-15-10-1. In the absence of any relevant authority for awarding attorney fees, we conclude that the trial court did not abuse its discretion by denying CSI's request for attorney fees. See, e.g., Buschman, 782 N.E.2d at 432 (holding that the party was not entitled to attorney fees).

For the foregoing reasons, we reverse the trial court's judgment for CSI on its fraud claim and affirm its denial of CSI's request for attorney fees.

Affirmed in part and reversed in part.

ROBB, J. and CRONE, J. concur